

**LAS VEGAS MEDICAL EQUIPMENT
REPAIR, INC.****PURCHASE ORDER NOS.
758-C21284 TO 758-C21290****VABCA-3848-54****VA OPC
LAS VEGAS, NEVADA**

Les Kerekes, President, Las Vegas Medical Equipment Repair, Inc., Las Vegas, Nevada, for the Appellant.

Christopher Johnson, Esq., Trial Attorney; *Leonard J. Malamud, Esq.*, Deputy Assistant General Counsel; and *William E. Thomas, Jr., Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE McMICHAEL

Las Vegas Medical Equipment Repair, Inc. (LVMER or Contractor) has appealed the termination for default of seven purchase orders issued by the Department of Veterans Affairs Outpatient Clinic (VA OPC), Las Vegas, Nevada, to repair specified wheelchairs. The Government filed a Motion to Dismiss for Lack of Jurisdiction, asserting that at the time the Contracting Officer issued the default terminations, the Contractor was "under the protection of the Bankruptcy Court" and consequently the terminations were "null and void and presently ha[ve] no legal effect."

The evidentiary Record includes the Appeal File submitted by the Government pursuant to Board Rule Four (R4), tabs 1 through 36 and the Appellant's Supplement (R4 Supp), tabs 37 through 40. Also included are the Government's Motion to Dismiss for Lack of Jurisdiction (with attached Exhibit 1) and the Appellant's Response to the Motion to Dismiss for Lack of Jurisdiction.

FINDINGS OF FACT

The following findings of fact are made for purposes of this decision only.

On June 15, 1992, Contracting Officer Donald G. Nevis, Jr. issued a variety of purchase orders, Nos. 758-C21284 through C21290, which placed orders with LVMER to repair designated wheelchairs at the VA Outpatient Clinic (VA OPC), Las Vegas, Nevada. (R4, tabs 10-16) In pertinent part, each of the orders identified a particular wheelchair, the parts required to repair the chair and the price of the repair. The seven purchase orders appear to have been generated from proposals for each of the chairs prepared by LVMER, which listed the parts and labor hours LVMER expected would be required for the repairs. Each of the purchase orders was issued on June 15, 1992, in response to LVMER proposals each dated June 10, 1992. The purchase orders also specified that LVMER would make delivery on or before August 15, 1992. (R4, tabs 10-16) Delivery was not made by August 15, 1992.

On March 15, 1993, Contracting Officer Nevis asked LVMER to determine whether it

had finished repairs on the wheelchairs for which the purchase orders had been issued. Nevis stated that LVMER should submit invoices for the repairs performed. (R4, tab 18) On or about March 22, 1993, LVMER sent a letter to the VA OPC, billing them for \$1,150 in repairs, \$7,200 in storage fees (9 months), \$584.50 in office personnel time spent on the VA invoices, and \$5,150 in issued purchase orders which had not been previously billed. This invoice also attached a billing statement from John W. McAnally, Biomedical Engineer, to Kerekes in the amount of \$51,945, for the period of December 21, 1990, through February 23, 1993. Mr. McAnally indicated that during this period he provided electronic charging, cleaning, disinfecting and inspecting of VA OPC equipment (presumably as a subcontractor) and billed LVMER for those services. (R4, tab 19)

The parties unsuccessfully attempted to meet to discuss these issues and, on April 5, 1993, Contracting Officer Nevis issued a Show Cause Notice ordering LVMER to respond within 10 days as to "why [it] ha[d] failed to perform and what the contractor intends to do to correct the problem." Nevis stated that LVMER had failed to perform on purchase orders 758-C21284 through C21290, and told LVMER: "I fully intend to terminate you for default for not delivering the VA's wheelchairs if your remedy is insufficient for my requirements." (R4, tab 29)

Kerekes responded to the Show Cause Notice on April 6, 1993. LVMER acknowledged that it had refused to deliver the wheelchairs referencing the VA's refusal to consider its bills and the mechanic's lien of \$78,800.50 filed by LVMER, and further alleged that the VA had failed to provide the parts necessary to perform the repairs. (R4, tab 30) By letter dated May 24, 1993, Contracting Officer Nevis directed LVMER to deliver the wheelchairs in the Contractor's possession which were the subject of the purchase orders, to the VA OPC within 10 days of the receipt of the letter or face default. (R4, tab 31) On June 11, 1993, Contracting Officer Nevis, citing Federal Acquisition Regulation 52.249-8, DEFAULT (FIXED PRICE AND SERVICE), defaulted LVMER on purchase orders 758-C21284 through C21290, when the wheelchairs had not been delivered. (R4, tab 34)

The above-captioned appeals were received and docketed on June 23, 1993. On September 16, 1993, the Government submitted a Motion to Dismiss for Lack of Jurisdiction. The Government stated that in terminating LVMER, the Contracting Officer was unaware that LVMER had previously filed a voluntary Petition in Bankruptcy under Chapter 11 of the Bankruptcy Code in November 1992. The Government further asserted that it did not receive notice of the filing from the Bankruptcy Court or the bankruptcy trustee until August 26, 1993. The Appellant does not dispute that it filed a Petition in Bankruptcy under the Bankruptcy Code prior to the Government's termination action. In its motion, the Government argues that because the Appellant was under the protection of the Bankruptcy Court at the time of the default terminations, the Contracting Officer's final decision terminating the purchase orders was "null and void." The Government asserts that it intends to seek relief from the automatic stay in order to again default Appellant.

On November 15, 1993, the *pro se* Appellant informed the Board that it did not object to Government's Motion for Dismissal, but alleged that the facts relating to its bankruptcy were well known to the Contracting Officer both prior to, and subsequent to,

the filing in Bankruptcy Court. The Appellant also indicated that it had amended its claim and resubmitted the claim with certification to the Director of the VA OPC. At the time of responding, the Appellant informed the Board that it had not yet received a response from the Director. (Appellant's Response to the Motion to Dismiss for Lack of Jurisdiction)

We are presented here with the question of whether the default terminations, issued approximately seven months after LVMER filed a voluntary Petition in Bankruptcy pursuant to Chapter 11 of the Bankruptcy Code, were rendered null and void, and whether the Board is without jurisdiction over the propriety of the default actions.

DISCUSSION

The only appeals before us involve the propriety of the terminations for default of the above-mentioned purchase orders, and these are Government claims. *Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988). The automatic stay provision of the Bankruptcy Code, provides as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * * * *

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

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(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

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(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay --

* * * * *

(4) under subsection (a)(1) of this section, of the commencement

or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. § 362.

This is a case of first impression for this Board. There is no Federal Circuit guidance for the treatment of default terminations issued *following* the filing of a Petition of Bankruptcy. However, the Third Circuit has stated, "we will assume without deciding that the government was barred by 11 U.S.C. § 362 (a) from terminating the contract without obtaining an order pursuant to 11 U.S.C. § 362 (d)." ***West Electronics, Inc. v. United States***, 852 F.2d 79, 82 (3d Cir. 1988) *citing* ***Computer Communications, Inc.***, 824 F.2d 725, 728-31 (9th Cir. 1987) and ***Minoco Group of Companies, Ltd.***, 799 F.2d 517 (9th Cir. 1986).

In ***Harris Products, Inc.***, ASBCA No. 30426, 87-2 BCA ¶ 19,807, the Armed Services Board of Contract Appeals considered an appeal with facts similar to ours, where the appellant was defaulted *after* it had filed for relief under Chapter 11. The board concluded that the automatic stay provision at Section 362 of the Bankruptcy Code rendered the default termination null and void, and the contract remained in an executory status:

[T]he contracting officer's attempt to terminate [the] contract after appellant's filing of its bankruptcy petition was null and void. The contract remains executory and not subject to termination action unless and until the automatic stay is lifted by the Bankruptcy Court.

Id. at 100,183. That board continues to follow ***Harris*** and dismisses appeals taken from contracting officers' decisions terminating contractors for default in which an appellant has previously filed a petition in bankruptcy. ***Sermor, Inc.***, ASBCA Nos. 32824, 32984, 1993 WL 325110 (August 16, 1993); ***C. Kennedy Manufacturing & Engineering***, ASBCA No. 43341, 93-3 BCA ¶ 25,974; ***Communications Technology Applications, Inc.***, ASBCA No. 41573, 92-3 BCA ¶ 25,211.

We find the reasoning set forth in these decisions persuasive. Under the facts presented here, the default actions, taken *after* the filing of the Petition in Bankruptcy, and without the lifting of the automatic stay, are null and void, and we lack jurisdiction to consider these appeals. The Contracting Officer cannot take administrative action to default LVMER until the VA obtains relief from the automatic stay or the stay is no longer in effect. We further find that the automatic stay has effect independent of the Contracting Officer's knowledge of the bankruptcy. ***Communications Technology***, at 125,601. Accordingly, as a matter of law, the VA could not default terminate the purchase orders after LVMER's filing of the Chapter 11 petition. The purchase orders remain in an executory status, and LVMER is allowed to maintain the *status quo*, pending the lifting of the automatic stay.

We should emphasize that this situation differs from the case where a termination for default has been issued *prior* to the filing of a petition in bankruptcy. In that situation, the

Board properly has jurisdiction over an appeal of the default. *See. e.g., **ERG Consultants, Inc.***, VABCA No. 3223, 92-2 BCA ¶ 24,905. In that case, where a voluntary petition in bankruptcy under Chapter 7 of the Bankruptcy Code was filed following the appeal of a default termination, the Board placed the appeal in suspense to permit the trustee in bankruptcy time to determine who was going to represent the debtor appellant and to give the Government the opportunity to seek relief from the automatic stay provision.

DECISION

Based on the foregoing, the Government's purported terminations of the contracts were null and void and accordingly, there are no matters before the Board over which it has jurisdiction. The appeals are dismissed pursuant to Board Rule 5.

DATE: **January 10, 1994**

GUY H. McMICHAEL III
Chief Administrative Judge
Panel Chairman

We concur:

MORRIS PULLARA, JR.
Administrative Judge

DAN R. ANDERS
Administrative Judge